Dato' Abdullah Hishan bin Hj Mohd Hashim v Sharma Kumari Shukla

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2–22–594 OF 1997
KAMALANATHAN RATNAM J
14 NOVEMBER 2000

Bankruptcy *— Offence — Committal order — Debtor's failure to comply with s 16 of the Bankruptcy Act 1967 — Whether an interested creditor may apply to commit the debtor to prison for failure to comply*

The plaintiff obtained a receiving and adjudication order against the defendant and the defendant was declared a bankrupt on 28 January 2000. On 5 April 2000, the defendant went to the official assignee's ('the OA') office and was requested to complete the prescribed forms relating to her financial affairs ('the statement of affairs') within 21 days in accordance with s 16 of the Bankruptcy Act 1967 ('the Act'). The statement of affairs comprised several sheets, including sheets marked 'A' to 'K'. The last day to submit the statement of affairs was 26 April 2000 but the defendant failed to do so. The plaintiff applied to commit the defendant prison for failing to comply with s 16 of the Act. In response to the plaintiff's application to commit, the defendant filed an affidavit in reply where she averred that she had been imprisoned on 25 April 2000 on a criminal charge and hence was unable to attend at the OA's office. The OA filed an affidavit in which he exhibited the statement of affairs filled up by the defendant and which was submitted to the OA on 25 September 2000. However, the sheets marked 'D', 'E' and 'F' were not completed by the defendant. In reply to many of the question contained in the statement of affairs, the defendant either stated that she could no recall or that she did not know the answer as she was in prison and had no access to relevant documents.

Held, allowing the plaintiff's application:

(1) It was a requirement that each of the sheets marked 'A' to 'K' be filled up and when filled up constituted the debtor's statement of affairs. As forms 'D', 'E' and 'F' were not completed by the defendant, the statement of affairs submitted to the OA did not constitute the defendant's statement of affairs. In the circumstances, the defendant had failed to comply with s 16 of the Act (see p 673E).

(2) If the OA did not move, any interested creditor ought to be able to move the court to commit the debtor for contempt because it was for the creditor's interest that the debtor be made to comply with the requirements of s 16 of the Act expeditiously (see p 673G–H).

(3) Notwithstanding that there were no rules governing contempt proceedings in the Act or in the Bankruptcy Rules 1969, the Rules

of the High Court 1980 ('the RHC') applied mutatis mutandis. The plaintiff was well within his right to have proceeded under O 52 of the RHC (see p 673H–I).

(4) Accordingly, the defendant was guilty of contempt of court in failing to furnish her statement of affairs as required under s 16(1) of the Act and sentenced to six month imprisonment with the sentence to take effect after the defendant had served her present sentence (see p 674B–C, E–F).

[Bahasa Malaysia summary

Plaintif telah mendapat satu perintah penerimaan dan penghukuman terhadap defendan dan defendan telah diisytiharkan seorang bankrup pada 28 Januari 2000. Pada 5 April 2000, defendan telah pergi ke pejabat pegawai pemegang harta ('PPH') dan telah meminta untuk menyelesaikan borang-borang yang ditetapkan berhubung urusan-urusan kewangan beliau ('pernyataan urusan-urusan tersebut') dalam tempoh 21 hari menurut s 16 Akta Kebangkrapan 1967 ('Akta tersebut'). Pernyataan urusan-urusan tersebut mengandungi beberapa keping, termasuklah kepingan bertanda 'A' hingga 'K'. Hari terakhir untuk mengemukakan pernyataan urusan-urusan tersebut adalah pada 26 April 2000 tetapi defendan gagal untuk berbuat demikian. Plaintif telah memohon untuk memasukkan defendan ke penjara kerana gagal untuk mematuhi s 16 Akta tersebut. Sebagai jawapan kepada permohonan plaintif untuk memasukkan, defendan telah memfailkan satu afidavit jawapan di mana beliau telah menegaskan bahawa beliau telah dipenjarakan pada 25 April 2000 atas tuduhan jenayah dan justeru itu tidak dapat hadir ke pejabat PPH. PPH telah memfailkan satu afidavit di mana beliau telah mengekshibitkan pernyataan urusan-urusan tersebut yang telah diisikan oleh defendan dan yang telah dikemukakan kepada PPH pada 25 September 2000. Namun begitu, kepingan yang bertandan 'D', 'E' dan 'F' tidak dilengkapkan oleh defendan. Sebagai jawapan kepada pelbagai soalan yang terkandung di dalam pernyataan urusan-urusan tersebut, defendan sama ada menyatakan bahawa beliau tidak mengingati atau tidak mengetahui jawapan kerana beliau berada di penjara dan tidak boleh dapatkan dokumen-dokumen berkaitan.

Diputuskan, membenarkan permohonan plaintif tersebut:

(1) Adalah satu keperluan bahawa setiap kepingan yang bertanda 'A' hingga 'K' diisikan dan apabila diisikan membentuk pernyataan urusan-urusan penghutang. Memandangkan borang-borang 'D', 'E' dan 'F' tidak dilengkapkan oleh defendan, pernyataan urusan-urusan tersebut dikemukakan kepada PPH tidak membentuk pernyataan urusan-urusan defendan. Dalam keadaan ini, defendan telah gagal untuk mematuhi s 16 Akta tersebut (lihat ms 673E).

(2) Jika PPH tidak berganjak, apa-apa pemiutang yang berminat sepatutnya boleh memohon mahkamah untuk menyabitkan penghutang kerana penghinaan kerana ia adalah untuk kepentingan pemiutang bahawa penghutang dikehendaki mematuhi keperluan-keperluan s 16 dengan cepat dan cekap (lihat ms 673G–H).

(3) Walaupun tiada apa-apa peraturan yang mengawal prosiding penghinaan di dalam Akta tersebut atau dalam Kedah-Kaedah Kebangkrapan 1969, Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') terpakai mutatis mutandis. Plaintif sememangnya berhak untuk meneruskan di bawah A 52 KMT (lihat ms 673H–I).

(4) Sewajarnya, defendan bersalah kerana penghinaan mahkamah kerana gagal untuk mengemukakan pernyataan urusan-urusan beliau sebagaimana yang diperlukan di bawah s 16 Akta tersebut dan dijatuhkan hukuman enam bulan penjara dengan hukuman bermula kuatkuasa selepas defendan menjalani hukuman sekarang ini (lihat ms 674B–C, E–F).]

Notes

For a case on committal order, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) para 1821.

Cases referred to

Dato' Abdullah Hishan bin Haji Mohd Hashim v Sharma Kumari Shukla (No 3) [1999] 6 MLJ 58 (refd)

J Raju a/l M Kerpaya v Commerce International Merchant Bankers Bhd [2000] 3 MLJ 177 (refd)

Legislation referred to

Bankruptcy Act 1967 s 16(3)
Bankruptcy Rules 1969 rr 175, 255, 276
Rules of the High Court 1980 O 52

DP Vijandran (*Muthu Suppiah* with him) (*Muthu Suppiah & Associates*) for the applicant/plaintiff.

Lambert Rasaratnam (*Sean Yeow* with him) (*Lee Hishammuddin*) for the respondent/defendant.

Mohd Noor Alias (*Azman Aiyub* and *Zalina Mohd Janis* with him) for the Official Assignee.

Kamalanathan Ratnam J:

Facts

The plaintiff sued the defendant over a loan of RM262,350 granted by the plaintiff to the defendant to enable the latter to purchase 162,000 shares in

Insas Sdn Bhd ('the shares'). The plaintiff also claimed exemplary and aggravated damages for deception and fraud in misleading the plaintiff into believing that the defendant would convert to Islam and marry him. The plaintiff succeeded and was also awarded a total sum of RM1,179,726.05 with interest and costs (see *Dato' Abdullah Hishan bin Haji Mohd Hashim v Sharma Kumari Shukla (No 3)* [1999] 6 MLJ 58). Since the defendant had failed to repay the judgment sum with interest and costs, the plaintiff obtained a receiving and adjudication order against the defendant and on 28 January 2000 the defendant was declared a bankrupt. On 16 August 2000 the Court of Appeal struck out the defendant's appeal against the judgment obtained. Further, on 14 August 2000, the defendant's appeal against the making of the receiving and adjudication order was struck out by the Court of Appeal after the defendant withdrew the said appeal.

The committal proceedings

This is the plaintiff's application to commit the defendant to prison for failing to comply with s 16(3) of the Bankruptcy Act 1967 ('the Act'). There was also a prayer for costs and such further or other relief the court deems just and proper.

Findings of the court

To consider this application, it is necessary to reproduce the relevant subsections of s 16 of the Act which read as follows:

> Debtor's statement of affairs
>
> (1) Where a receiving order is made against a debtor he shall make out and submit to the Official Assignee a statement of and in relation to his affairs in the prescribed form, verified by affidavit, showing the particulars of the debtor's assets, debts and liabilities, the names, residences and occupations of his creditors, the securities held by them respectively, the dates when the securities were respectively given, the cause of his insolvency, the date when he last balanced his accounts before becoming insolvent, the amount of his capital at the date of such balance, after providing for all his liabilities and making allowances for bad and doubtful debts, and such further and other information as is prescribed or as the Official Assignee requires.
>
> (2) The statement shall be so submitted within the following times:
>
> (a) if the order is made on the petition of the debtor, within seven days from the date of the order:
>
> (b) if the order is made on the petition of a creditor, within twenty-one days from the date of the order,
>
> but the Official Assignee may in either case for special reasons extend the time by order made under his hand, to be forthwith filed, recording the reasons therefor.
>
> (3) If the debtor fails without reasonable excuse, proof whereof shall lie on him, to comply with the requirements of this section he shall be guilty of a contempt of court and may be punished accordingly, and the court may on the application of the Official Assignee or of any creditor adjudge him bankrupt.

A (4) Any person staling himself, in writing, to be a creditor of the bankrupt may personally or by agent inspect this statement at all reasonable times and take any copy thereof or extract therefrom, but any person untruthfully so staling himself to be a creditor shall be guilty of a contempt of court and shall be punishable accordingly on the application of the Official Assignee.

B On 5 April 2000, the defendant went to the office of the official assignee ('the OA') and was given 21 days to complete the prescribed form relating to her affairs. The last day for submitting the form was therefore 26 April 2000. On 21 August 2000, the defendant, who is already serving sentence of imprisonment for a criminal offence, was produced before me when the C plaintiff made an application for an order that the remaining shares be transferred to his name. When the defendant was asked by the court if she knew why she had been brought to court, she said she merely had an inkling. It was only then discovered that even as at 21 August 2000 the defendant had not submitted the prescribed form although she was bound by law to have done so within 21 days.

D In response to the plaintiff's application to commit, the defendant filed an affidavit in reply (encl 207) wherein she averred that on the day before the last date for her to submit the form, she was found guilty and imprisoned on 25 April 2000 on a criminal charge. She therefore argued that she was unable to attend the office of the OA. She also averred that at that time she was under great emotional stress. The OA then filed an E affidavit in which he exhibited the form filled up by the defendant and submitted to him on 25 September 2000.

It is clear to me that the defendant had absolutely no intention of complying with the requirement of s 16(3) of the Act. The defendant was given the form on 5 April 2000. Surely she could have filled it and submitted F the same at the earliest possible time. There was no need for her to have waited up to 26 April 2000. Besides, if she had any difficulties she could have enlisted the help of the OA in filling up the form. As for her state of emotional stress, there is no acceptable reason given why she could only file the return in September 2000.

G The OA had in his affidavit exhibited as exhs MNMA-1 and 2, the statement of affairs filed by the defendant. She writes in her statement of affairs as follows:

> Nota
>
> I have been able to provide information to the best of my knowledge in my H present circumstances in prison — where I have no access to documents/files which may be relevant. My present state also doesn't leave me in a right frame of mind to record these details.
>
> 25 September 2000

In respect of the statement of affairs she has written 'tidak ingat' to each I question. As for the rest of the questions, she had quite candidly stated as follows:

> Unable to furnish or remember as no documents, if applicable, in penjara.

It is plain that she has been unable to furnish details not because she did not have the documents at all but because she did not have the relevant documents in prison. It is also to be noted that in her affidavit in reply (encl 207) she had averred that if not for her imprisonment, she would have filed the statement of affairs in time. If that was her problem I cannot understand why she had not instructed her husband to get the documents for her to enable her to complete the statement of affairs. Surely her husband would be in a position to assist her. No explanation was given as to why she did not ask for her husband's help. It is therefore obvious that the defendant had no intention of co-operating. She thought she was being clever in filling up the statement in the manner she did to frustrate the plaintiff who would be unable to know of her assets. What she has submitted is also not a complete set of her statement of affairs. She has not disclosed Schedules D, E and F to the OA as he has not exhibited them. All in all, the defendant was thumbing her nose at the system. Even up to the date of the hearing of the application to commit, the defendant did not apply for an adjournment to obtain the relevant documents to assist her to comply with the requirement of s 16(3) of the Act. Relying upon the decision of the Court of Appeal in *J Raju all M Kerpaya v Commerce International Merchant Bankers Bhd* [2000] 3 MLJ 177, the plaintiff drew a parallel and submitted that since the defendant has not complied properly with s 16(3) of the Act, the statement of affairs ought to be treated as null and void. In *Raju*'s case the appellant's application to set aside the bankruptcy notice ('the BN') was grounded on the fact that the amount claimed in the BN included a claim for 'penalty interest calculated at varying rates' as well as a claim for stamp duty, which was never provided for in the judgment that was awarded to the respondent. The Court of Appeal held that the BN had not been filed in accordance with the judgment obtained by the respondent, and was therefore null and void ab initio. Mr Rasaratnam for the defendant argued that it cannot be said that an incomplete statement of affairs is not a statement of affairs. He argued that so long as the defendant had complied with the requirement of submitting the statement of affairs, whether complete or incomplete, she is deemed to have filed and submitted the statement of affairs. In the case before me certain schedules to the statement of affairs are missing, namely, Schedules D, E and F.

The Bankruptcy Rules 1969 that govern the completion of the statement of affairs are rr 175 and 255. They read as follows:

> 175 How made out
>
> The debtor shall be furnished by the Official Assignee with instructions for the preparation of his statement of affairs. The statement of affairs shall be made out in duplicate and one copy shall be verified. The Official Assignee shall file in court the verified statement of affairs submitted to him by the debtor.
>
> 255 Duties as to debtor's statement of affairs
>
> (1) As soon as the Official Assignee receives notice that he has been appointed to the receivership of an estate he shall furnish the debtor with a copy of instructions for the preparation of his statement of affairs.

(2) The Official Assignee shall also furnish the debtor with all such explanations as he may require for the preparation of the said statement.

(3) The Official Assignee or some person deputed by him shall also forthwith hold a personal interview with the debtor for the purpose of investigating his affairs and for determining whether or not the estate should be administered under s 106.

(4) It shall be the duty of the debtor to attend at such time and place as the Official Assignee may appoint.

The defendant never approached the OA for any assistance.

The commencement of the statement of affairs reads as follows:

STATEMENT OF AFFAIRS

To the debtor —

You are required to fill up, carefully and accurately, this sheet and the several sheets, A, B, C, D, E, F, G, H, J and K (a) showing the state of your affairs on the day on which the receiving order was made against you, viz, 28 January 2000. Such sheets, when filled up, will constitute your statement of affairs. When completed, such statement must be verified by oath or declaration.

It is therefore a requirement that each of the sheets marked A–K has to be filled up and when filled up constitute the debtor's statement of affairs. In this case, since sheets D, E and F are missing and not filled up by the defendant, clearly the statement of affairs as submitted cannot in the words of the form itself 'constitute' the statement of affairs. In the circumstances, I hold that the defendant had failed to comply with s 16(3) of the Act.

Can the plaintiff apply for committal proceedings?

Mr Rasaratnam argued that the applicant for contempt proceedings under this section ought to be the OA and not the plaintiff or any other creditor of the bankrupt. He referred me to Form 120 which is captioned as follows:

APPLICATION OF OFFICIAL ASSIGNEE FOR COMMITTAL OF BANKRUPT OR OTHER PERSON

He therefore argued that since the form only provides for the OA to apply, no other person ought to be able to do so. To my mind, the form is merely an example or a sample. Surely if the OA does not move, then any interested creditor ought to be able to move the court for contempt because it is in the creditor's interest that the debtor be made to comply with the requirement of s 16 expeditiously. In this case, it is obvious that the OA did not move in spite of the debtor's failure to submit the form for more than four months.

Notwithstanding the fact that there are no rules governing contempt proceedings, r 276 of the Bankruptcy Rules 1969 reads as follows:

Rules of the High Court applicable in event of lacunae

In the absence of any rule regulating any proceeding under the Act or these Rules, the Rules of the High Court shall apply, *mutatis mutandis*.

Therefore, the plaintiff was well within his right to have proceeded under O 52 of the Rules of the High Court 1980.

Mr Rasaratnam also argued that the proper forum for hearing the motion under s 16(3) of the Act should be the High Court exercising the bankruptcy jurisdiction in that matter. This submission totally ignores the latest direction from the Chief Registrar that this court shall be the forum to hear all contempt proceedings. As for the intitulement, I am satisfied that the intitulement as pleaded sufficiently reflects the proceedings at hand. In any case, this entire suit was filed and heard in this court. I therefore hold that this court is the proper forum to hear these contempt proceedings.

Having heard all arguments, I found the defendant guilty of contempt of court in failing to furnish the statement of affairs as is required by s 16(1) of the Act. Having found the defendant guilty I asked if there was anything to be said towards mitigation. I was totally taken aback when Mr Rasaratnam informed the court that what he wished to say in mitigation has been set out in encl 207. There is nothing mitigating in encl 207. If at all, it is aggravating. Even at this stage, the defendant was unrepentant. If only she had admitted her mistake and sought compassion from the court, the court would have lent a sympathetic ear. Her defiant and arrogant stand was reflected in her attitude towards mitigation. Not a word in mitigation was heard.

Besides, I wanted this case to reflect the seriousness with which this court views non-compliance of s 16(3) of the Act. If every debtor elected to give replies in the manner this defendant has done, the OA's job would become very onerous. Judgment creditors will have nothing more than paper judgments and the OA will be powerless. A custodial sentence will show to recalcitrant defendants that it would not pay to flout s 16(3) of the Act. I therefore sentenced the defendant to six months' imprisonment with the sentence to take effect after she had served her present sentence. I also imposed a fine of RM50,000 in default three months' imprisonment.

Plaintiff's application allowed.

Reported by Andrew Christopher Simon